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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No.

ANTHONY SALVAGGIO
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner Anthony Salvaggio respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 13, 1972.

The opinion of the Court of Appeals (Friendly, Oakes and Smith, Circuit Judges) is unreported. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION.

The judgment and opinion of the Court of Ap-

peals, sub nom. United States v. Anthony Salvaggio, from which review is sought, was entered on April 13, 1972 without written opinion. A petition for rehearing by the Court of Appeals was denied on May 8, 1972.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Can testimony given in a hearing before a United States District Court that decides it is without jurisdiction in the matter be considered material in a prosecution for perjury?

2. Is the two witness rule in perjury prosecution met by the testimony of one witness and self serving correspondence from the same witness?

3. Does the court's request for objection to its charge in the presence of the jury violate Rule 30 of the Federal Rules of Criminal Procedure?

STATEMENT OF THE CASE.

I. THE PROCEEDINGS.

On June 30, 1971, a Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment charging that the petitioner, Anthony Salvaggio, while under oath as a witness in a civil case being heard in the United States District Court for the District of Connecticut, knowingly did make a false motive declaration in violation of Section 1621, Title 18, United States Code.

On October 20, 1971, trial of the petitioner commenced before the Honorable Thomas F. Murphy, United States District Judge, sitting by designation, and a jury of twelve. On October 21, 1971, the jury found petitioner guilty.

On December 13, 1971, petitioner was sentenced to the custody of the Attorney General for a term of five years. Execution was suspended and Defendant was placed on probation for five years. Timely notice of appeal was filed resulting in the proceedings in the Court of Appeals hereinbefore described in the Statement of Jurisdiction.

II. STATUTE INVOLVED.

Title 18, United States Code, Section 1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

III. THE FACTS.

On January 11, 1971 petitioner testified in the United States District Court in an action wherein as plaintiff he was seeking injunctive relief on the ground that an investigation by a one man grand jury authorized by Connecticut statutes violated his constitutional rights. Salvaggio also sought a temporary restraining order to enjoin the defendants on the ground that immediate and irreparable loss would result to him in the interim. (10a-11a). Salvaggio testified there had been much publicity in the Bridgeport newspapers with respect to his appearance before the Grand Jury and as a result he was having trouble at home with his family and he had been refused credit at the Mechanics and Farmers Bank in Bridgeport. (4-a) He claimed that, in a round about way, he was told by Mr. Honrath, a bank vice-president that he was being refused credit because of the one man grand jury situation. He further testified that in a round about way Honrath mentioned Salvaggio was getting his name in the paper regarding the investigation. (6a). Throughout his testimony Salvaggio testified the credit refusal was stated to him in a round about way. (2a-9a)

Mr. Honrath, an assistant vice president of the bank, testified in direct examination that in December of 1970 Salvaggio made application for two mortgages in the amount of $22,500.00 each for two parcels of investment property on Orchard Street in the City of Bridgeport. He testified there was a problem with the credit report, but on January 5, 1971 the bank real estate committee approved both mortgages (14a-15a). He further testified he never talked to petitioner about his name appearing in the Bridgeport papers and further he never refused a mortgage to petitioner. (17a-18a).

On cross-examination Honrath testified applications for the same pieces of property were made in September 1970 but disregarded because of a problem with the City of Bridgeport Housing Code Enforcement Office. Mortgage applications were filed in March of 1970, but a credit report showed outstanding tax liens against petitioner, but a revised credit report was to show that the tax liens had in fact been released. (25a) He testified he could have spoken to petitioner between September 1970 and December 1970 about the same tax liens and the housing violations. (38a, 39a). Honrath also testified he tried to put across to petitioner's private investigator in an interview on July 27, 1971 the point that you hear things . . . you always hear talk (referring to petitioner's involvement). (42a-44a)

Miss Sandra Fasanella the bank Secretary testified that on January 7, 1971 (a Thursday) in the regular course of business a mortgage commitment letter was sent to petitioner at his home in Fairfield and on the same date (Thursday, January 7, 1971) a search order was sent to Mr. Lyddy, petitioner's closing attorney. 53a).

The Government's last witness Attorney Raymond C. Lyddy of Bridgeport testified he had been petitioner's attorney in connection with the mortgage applications and the search order was brought to his attention on Monday, January 11, 1971 (the same day petitioner was in Hartford testifying in the United States District Court). Lyddy testified that mail from banks took two days to reach him in Bridgeport. Search orders were picked up at the bank in order to avoid the two day delay. He further testified he did not come in to his office on Saturdays (the 9th of January). (54a-62a).

The action petitioner commenced in the United States District Court was dismissed because of failure of the complaint to state a claim upon which relief can be granted and because the Court lacked jurisdiction to grant the relief requested. This judgment was subsequently affirmed by this Court. The Court in its written memorandum of decision made a finding that petitioner's testimony was conflicting and evasive and that petitioner testified the banker did not specifically give as the reason for the denial of credit the fact that he had seen his name in the paper recently. Judge Clarie further found that petitioner himself had concluded that this must have been the reason. (82a-84a).

REASONS FOR GRANTING THE WRIT.

I. If A Court Is Without Jurisdiction In A Matter Then It Cannot Be Said That Testimony Presented To The Same Court Is Material.

In order for testimony to be material it must have some weight and reference to the determination of an issue. It is conceded the Court makes the determination in the issue of materiality. **Masinia v. United States,** 296 F. 2d 871 (8 Cir. 1961); **United States v. Edwards,** 443 F. 2d 1286 (8 Cir. 1971).

The governing criteria concerning the materiality of false testimony is whether or not the perjurious statement impedes or hampers the course of the hearing in a sense that it has a tendency to affect the ultimate decision of the trier. In the present case that this did not or could not affect the decision of the trier is abundantly clear. The proceeding held before Judge Clarie in Hartford on January 11, 1971 was a hearing and ruling on Defendant's motion to

dismiss as well as a ruling on petitioner's motion to convene a three judge District Court. The case was decided on the Defendants' motions to dismiss wherein they contented Petitioner's standing to challenge the constitutionality of the Grand Jury investigation. For the purposes of a motion to dismiss the material allegations of the complaint are admitted. **Walker Process Equipment Inc. v. Food Machinery & Chemical Corp.,** 382 U.S. 172, 174-175 (1965).

In the case pending before Judge Clarie who heard the civil matter there was no question of fact but only of jurisdiction. Whether petitioner was or was not extended credit was immaterial on the issue of jurisdiction and that was all the Court was required to decide and did in fact decide. (81a). Petitioner had no criminal proceedings pending in a State Court, and he was seeking redress by way of declaratory relief in a federal court on the basis that the Statute on its face was unconstitutional. It should also be noted that the attorney representing Judge Cotter and Judge Johnson objected to any questions relating to irreparable harm on the basis of materiality. (2a-3a) Counsel said the issue was whether or not there was any state remedies still available. Judge Clarie ruled one or two short questions could be asked so that in case of an appeal a record would be available. (3a) The fact that the testimony was received is not, standing alone, sufficient. **People v. Planer,** 72 P. 2d 767.

False testimony which should have been excluded on the ground of immateriality is **not** perjury. **People v. Brill,** 165 N.Y.S. 65, 100 Misc. 92 **Ross v. Rouse,** 1 Wend. 475; **Wood v. People,** 59 N.Y. 117. "Materiality" is defined in **Bouvier's Law Dictionary** as follows. "One property of substantial importance or

influence, especially as distinguished from formal requirement. Capability of properly influencing the result of the trial " In the hearing on January 11, 1971 there was nothing material about petitioner's testimony. Not every knowingly false statement under oath is perjurious for such a ruling would eliminate the materiality requirement. **United States v. Freedman,** 445 F. 2d 1220 (2 Cir. 1971).

It has long been recognized that materiality is much more difficult to prove where the alleged perjury comes out of a civil or criminal trial as opposed to where it comes out of a grand jury proceeding. The reason is that the purpose of the investigation of a grand jury is rather narrow and limited and most of the questions in such a proceeding are directed to a specific end; whereas in a civil or criminal trial or other proceeding arising out of the inquiry is broader and questions which are not material are often asked and answered. See **United States v. Stone,** 429 F2d 138 (2 Cir. 1970). The question of whether or not petitioner had been denied a mortgage loan was absolutely immaterial as to whether or not the Court had jurisdiction. In **Beckanstin v. United States,** 232 F.2d, 1 (5 Cir. 1956) the court reversed the trial judge's finding that the question was material to the proceedings. It found the claimed perjured testimony was not material when it considered the underlying law suit. This court should consider the underlying law suit to see if the testimony complained of was material. See also, **United States v. Cobert,** 227 F. Supp. 915 (DCDC 1964); cf. **United States v. Lattimore,** 127 F. Supp. 405 (DCDC 1955).

As we have discussed above the test of materiality for perjury arising out of a criminal proceeding is much more stringent than for perjury arising out of

a grand jury proceeding. But even in a grand jury proceeding the testimony must have had the natural effect or tendency to influence, impede or dissuade the grand jury. **U. S. v. McFarland,** 371 F2d 701 (cert. denied 387 U. S. 906); **United States v. Feiorello,** 376 F2d 180 (2 Cir. 1967). Even under this standard the questions and answers complained of can not be considered to have had any substantial effect or tendency to influence, impede or dissuade the trier in the civil proceeding as to any material issues.

II. The Government Failed To Comply With The Strict Burden Of Proof Required In Perjury Cases.

It is a deeply implanted rule of our jurisprudence that perjury convictions should not rest solely on an oath against an oath. **Weiler v. United States,** 323 U.S. 606 and therefore a conviction under § 1621 must be proved by the testimony of two witnesses, or the testimony of one witness corroborated by independent evidence, **United States v. Manfredonia,** 414 F.2d 760 (2 Cir. 1969) Circumstantial evidence may be considered as independent evidence if it is "of a quality to assure that a guilty verdict is solidly founded." **United States v. Collins,** 272 F.2d 650, (2 Cir. 1969), **cert. denied,** 362 U.S. 911 (1960). The circumstantial evidence must be such that standing alone, it must have independent probative value. The important issue whether petitioner had in fact been told that the publicity was not helpful to his mortgage application is not independently explained by proving that a search order was mailed.

The simple truth is there is no independent evidence "of a quality to assure that a guilty verdict is solidly founded." The Government relied on the tes-

timony of Attorney Lyddy to corroborate the testimony of Mr. Honrath, but the fact is Mr. Lyddy's testimony backfired and Lyddy said he didn't get his search order at his Bridgeport office confirming the mortgage approval until January 11, 1971 (Monday) the exact time petitioner was testifying some 60 miles away in Hartford (60a). That the Government relied on Mr. Lyddy to get it by the special rule for perjury prosecutions is clear by reading the indictment. The indictment makes it clear and recites as follows:

> The aforesaid testimony of ANTHONY SALVAGGIO, as he then and there well knew and believed, was not true (1) that is on or about the 7th day of January, 1971, the attorney for the defendant was notified of the approval of mortgages by the Mechanics And Farmers Bank. (2) At no time did Mr. Honrath of the Mechanics And Farmers Bank deny the defendant herein a loan because of newspaper publicity. (R-1)

If Lyddy received the mortgage approval on **Monday,** January 11, 1971 while at the same time petitioner was in Hartford testifying then Lyddy's testimony does not corroborate but completely isolates Honrath's testimony. By independent testimony we mean someone who might have overheard the conversation or something attributable to petitioner. Sending a letter that could never have been received in time does not meet the stringent requirement of the two-witness rule, nor by any stretch of the imagination corroborate Honrath.

Appellate Courts have described the prosecution's burden of proof as an exceptionally stringent one and have often referred to it as requiring strict proof.

Spaeth v. United States, 232 F2d 776, 777 (6 Cir. 1956); **United States v. Johnson,** 413 F2d 22 (6 Cir. 1969). The unique evidentiary rule requiring proof of perjury by two witnesses or by one witness was substantial corroboration has been long revered. **United States v. Remington,** 191 F2d 246 (2 Cir. 1951) **cert. denied** 343 U.S. 907; **United States v. Goldberg,** 290 F2d 729 (2 Cir. 1961) **cert. denied** 368 U.S. 899. The proof must be shown to have been by clear, convincing and direct evidence beyond a reasonable doubt that the defendant committed wilful and corrupt perjury. The burden is on the government to prove the essential elements by substantial evidence excluding every other hypothesis than that of defendant's guilt, **probable** or **credible evidence** not being enough. **Brown v. United States,** 245 F2d 549 (9 Cir. 1957); **United States v. Alu,** 236 F2d 179 (3 Cir. 1956); **United States v. Ness,** 212 F2d 297 (3 Cir. 1954). These special rules have been fashioned for a definite purpose. The charge of perjury is one in which the prosecutive discretion behind the decision to seek an indictment is more apparent than in any other federal crime. Here for example, one who seeks to enjoin a one man investigative grand jury is much more likely to be a target for overzealous law enforcers. Accordingly, it is the court that has the primary responsibility for checking abuses of prospective discretion in perjury cases brought against unpopular defendants.

This is a classic case that should not have been submitted to the jury. Not only were the questions and answers immaterial and of **de minimis** import in the proceeding below but as the facts came out at trial, the charge of notice to counsel's attorney on January 7, 1971 proved inaccurate. Petitioner was clearly not an experienced witness as can be seen

by his testimony at the injunction hearing. Perjury is a very unique crime and this Court should closely scrutinize petitioner's January 11 ,1971 testimony in light of the Government's claim of compliance with the "two-witness" rule.

III. The Court's Failure To Allow Opportunity For Defense Counsel To Make Objection To The Court's Charge Constitutes Reversible Error.

Rule 30, Fed. R. Crim. Prac. provides in pertinent part: "Opportunity **shall** be given to make the objection (to the charge) out of the hearing of the jury and, on request of any party, out of the presence of the jury." (Emphasis added.)

In the present case the Court clearly violated Rule 30's explicit and mandatory direction.

At the completion of the charge the following took place:

> Court: Now gentlemen, just answer this question with the word "yes" or "no". Are there any exceptions, Mr. Byelas?
>
> Mr. Byelas: No, Your Honor.
>
> The Court: Or, Mr. Owens?
>
> Mr. Owens: No, your Honor.
>
> The Court: All right.
>
> The jury may retire.... (78a, 79a)

The obvious reason for the rule is every trial judge and trial lawyer is aware of jurors' sensitivity to the attitudes of counsel in their disagreements with the trial judge.

United States v. Schactner, 426 F.2d 470, 479 (3 Cir. 1970); **United States v. Titus,** 221 F.2d 571 (2 Cir. 1955). The District Court Judges for the District of Connecticut have long followed Rule 30 and have instructed the jury to retire but not to commence deliberations prior to having exhibits delivered to them and being instructed to begin deliberations. This is done so the jury will not get the impression of any hostility between court and counsel.

The Court in **Lovely v. United States,** 169 F.2d 386, 391 held:

> "Ordinarily, failure to observe the requirements of this rule (30) will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom; for counsel shall not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

CONCLUSION.

Each of the issues presented herein poses important questions of federal criminal law which should be decided by this Court.

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of

that court herein, being the case numbered and entitled in its docket No. 72-1099 "United States vs. Anthony Salvaggio," and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 6th day of June, 1972.

ANTHONY SALVAGGIO
Petitioner
By HOWARD T. OWENS, JR., ESQ.
Attorney for Petitioner

OWENS & SCHINE
With him on the Petition